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Sec. 7 15

Sec. 8 15

Sec. 10 15

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 851

INDIANAPOLIS POWER & LIGHT COMPANY, PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. III, 58–68)[1] is reported in 122 F. (2d) 757. The findings of fact, conclusions of law, and order of the National

[1] Pursuant to stipulation of the parties (R. III, 89–90), the printed record for purposes of the petition for certiorari consists of Appendices "A" and "B" to petitioner's brief in the court below, referred to herein as App. A and App. B, respectively; and the appendix to the Board's brief and the proceedings in the court below contained in "Volume III," referred to herein as R. III.

Labor Relations Board (App. A., 110–149) are reported in 25 N. L. R. B. No. 21.

JURISDICTION

The decree of the court below (R. III, 81–83) was entered on October 29, 1941. The petition for a writ of certiorari was filed on January 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the court below held that it was without power to determine whether the Board's findings are supported by substantial evidence.

2. Whether the court below was required to set out in its opinion the evidence supporting the Board's findings of unfair labor practices.

3. Whether there was substantial evidence to support the Board's findings that petitioner discriminatorily discharged two employees, in violation of Section 8 (3) and (1) of the Act, and engaged in other conduct violative of Section 8 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 15–16.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (App. A, 110–149). The facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

In February or March 1937 Chief Engineer Goodrich induced a group of petitioner's generating plant employees to abandon their plan to make a collective request for a wage increase; he told two members of the group, Elbreg and Collier, that the men were "absolutely wrong to try to approach him collectively," and that he would confer with them individually but not "as a group" (App. A, 134; App. B, 217–221, 242–244, 565–566). A few months later when Utility Workers Organizing Committee (U. W. O. C.), affiliated with the C. I. O., was seeking to organize employees at the generating plants, various officials of petitioner made remarks intended to discourage adherence to that union. Goodrich and other supervisory employees questioned employees concerning membership in and activities of the U. W. O. C., implied that "violence and bloodshed" and an extended stoppage of work would accompany organization by it (App. B, 224), and asserted that "we are going to try to

[2] In the following statement the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

keep it [the C. I. O.] out as long as we can" (App. B, 253) App. A, 135–136; App. B, 129–137, 148–149, 221–225, 251–256, 294–295, 432–433. At the same time petitioner favored and supported the Indianapolis Power & Light Employees' Protective Association, an "inside" union. It permitted that organization to solicit members on company time and property; supervisory employees made statements to subordinates which identified petitioner's interests with those of the Association and disclosed petitioner's approval of that organization (App. A, 141–143; App. B, 292–293, 318–322, 361–366, 368–372, 375–377, 433–434). The Board found that petitioner, by preventing the employees from presenting the collective request for a wage increase and cautioning them against concerted activity, by its conduct in opposition to the U. W. O. C., and by assisting and supporting the Association, interfered with, restrained, and coerced the employees in violation of Section 8 (1) of the Act (App. A, 134–135, 137, 143).

The Board found further that during a business decline petitioner discriminatorily discharged generating plant employees Elbreg and Collier, in violation of Section 8 (3) and (1) of the Act (App. A, 137–141). These men had been singled out for reprimand by Chief Engineer Goodrich when the group of employees, including themselves, sought to present a collective demand for a wage increase (*supra,* p. 3). They were among the

first to join the U. W. O. C., and they promptly became active in its behalf (App. A, 134–136, 137; App. B, 215–216, 221–222, 224, 241, 244–245, 276); they were elected secretary and president, respectively, of the U. W. O. C. a few months before their dismissals (App. A, 135; App. B, 186, 225, 254); and they had been questioned and warned by petitioner's supervisors concerning the U. W. O. C. (App. A, 135–136; App. B, 223–224, 251–253).

Moreover, the reasons offered by petitioner for its selection of Elbreg and Collier for dismissal were unconvincing. The criteria allegedly followed were merit, efficiency, and length of service with the company (App. A, 138; App. B, 14). But Elbreg and Collier admittedly had greater seniority than at least two of the four other employees doing the same work who were retained (App. A, 138; App. B, 23–24, 590–591), both were competent workers, and there was no suggestion that they were less efficient than the men retained (App. A, 138–139; App. B, 596). And while petitioner also claimed that Elbreg and Collier were selected for discharge because they could not work as general repair men in addition to doing their regular work as condenser pit operators, only one of the four men retained had any repair gang experience, and he had not done such work for eleven years (App. A, 138–139; App. B, 23–24, 591). Finally, the evidence did not support the

claim that alleged deficiencies of "personality" were a factor in the dismissals. The only evidence that Elbreg was deficient in this respect concerned his talking too much, particularly while the U. W. O. C. campaign was going on (App. B, 596, 631–633). Chief Engineer Goodrich admitted, however, that this "never interfered with [Elbreg's] work" and that Elbreg had never been "in trouble" (App. A, 139–140; App. B, 596). Collier had had an altercation with a foreman off company property in 1936, but this had been amicably settled at the time (App. A, 139–140; App. B, 278–280). There was also testimony that Collier, like many other employees, was "more or less grumpy and grouchy" (App. A, 139–140; App. B, 547, 569–571). The Board concluded that Elbreg and Collier were selected for dismissal during the business decline because of their outstanding participation in union activities, and not for the reasons asserted by petitioner (App. A, 140–141).

Upon these findings the Board ordered petitioner to cease and desist from its unfair labor practices, to reinstate Elbreg and Collier with back pay, and to post notices (App. A, 145–149).

The Board also found that petitioner engaged in conduct violative of Section 8 (1) and (3) of the Act at its radio station, which petitioner subsequently sold (App. A, 133). The court below set these findings aside as not adequately supported

by evidence (R. III, 64–67). While we believe the court's decision in this regard to be erroneous,[3] we have not regarded the question as of sufficient importance to warrant a petition for certiorari on behalf of the Board. Accordingly, we have not discussed this portion of the Board's findings here.

On September 9, 1940, petitioner filed in the court below a petition to review and set aside the Board's order (R. III, 5–23). The Board answered, requesting enforcement of the order (App. A, 150–157). On May 14, 1941, the court handed down an opinion and entered an order enforcing the Board's order in full,[4] including the portions based on findings of unfair labor practices at the

[3] The Board found that petitioner, to forestall collective action, granted employees at the radio station an unsolicited wage increase the day before the employees there were to hold a meeting to discuss grievances; that Chief Engineer Williams questioned an employee concerning the meeting; that Williams and Manager Blossom thereafter attended the meeting uninvited and warned the employees against collective bargaining or further such meetings; that Williams later questioned employees concerning union activities at the station; that Blossom requested an employee to act as an informer with respect to unionization; and that petitioner discriminatorily discharged Rennaker, an employee at the station, whose interest in unionization was pronounced and well known to petitioner (App. A, 123–134; App. B, 345–358, 416–420, 425–426).

[4] The court upon request of the Board set aside the "work-relief" provision held invalid in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7 (R. III, 35).

radio station (R. III, 26–35). The court in its opinion, however, mistakenly stated that it was the Board's position that under the Act the court was required to give finality to Board findings if there was "any" evidence whatever to support them, and that the court lacked power to determine whether the findings were supported by "such relevant evidence as a reasonable mind might accept as adequate to support" a conclusion (R. III, 31–32). On May 19, 1941, the Board moved to have the opinion modified in this respect, on the ground that the Board's position had been mistated (R. III, 36–38). The motion declared that it was the Board's view that (*id.*, 37–38):

> * * * while the reviewing court is not empowered to "substitute its judgment on disputed facts for the Board's judgment" (*National Labor Relations Board* v. *Link-Belt Co.*, 61 S. Ct. 358, 365), it is clearly empowered to pass upon the question of whether or not the Board's findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229).

On May 26, 1941, petitioner filed a response to the Board's petition (R. III, 40–46), and on May 29, 1941, a petition for rehearing (R. III, 50–56). Thereafter, on September 15, 1941, the court issued its order withdrawing and vacating its prior

opinion and order (R. III, 57), and handed down its final opinion herein. In its final opinion the court omitted the language of the first opinion to which the Board had taken exception, sustained the Board's findings of unfair labor practices at the generating plant, held that the Board's findings of unfair labor practices at the radio station were unsupported by substantial evidence, and set aside the portion of the Board's order based on the latter (R. III, 57–68). A further petition for rehearing filed by petitioner (R. III, 70–76) was denied on October 9, 1941 (R. III, 78), and a decree was entered on October 29, 1941 (R. III, 81–83).[5]

ARGUMENT

1. Petitioner asserts (Pet. 6–7, 31–32, 33–35; Br. 6, 22–23, 25–28, 33–47) that the court below, feeling constrained by recent rulings of this Court (*National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584), considered itself lacking in power to determine whether the Board's findings were supported by substantial evidence—i. e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion—and that petitioner was thereby deprived of the judicial review contem-

[5] An application by the Board to resettle the decree (R. III, 91–98) was denied on November 27, 1941 (R. III, 108).

plated by the Act. The court's first opinion enforcing the Board's order in full does contain language (R. III, 31–32) indicating that this was then the court's view. But it is plain from the proceedings in the court below subsequent to the rendering of that opinion (Statement, *supra*, pp. 7–9), as well as from the face of the court's second opinion, that the court deliberately withdrew the language in question. The final opinion declares that (R. III, 66)—

> * * * it is now conceded that this court is empowered to pass upon the question whether the Board's findings and conclusion in this respect are supported by such relevant evidence as a reasonable mind might accept as adequate to support such findings and conclusion.

This is the test which has received the approval of this Court (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229). That the court below was not indulging in any excessive self-abnegation in its consideration of the evidentiary support for the Board's findings is apparent from the fact that it set aside as unsupported by substantial evidence a portion of the Board's findings and order upheld in its first opinion. See pp. 6–7, 9, *supra*.

2. Petitioner further complains (Pet. 32, 35; Br. 23, 27–29, 44–47) of the failure of the court below to set forth in the opinion "a sufficient review or exposition of the evidence to explain" the

decision. But there is no statutory obligation under the National Labor Relations Act, nor any extra-statutory reason of policy, requiring a reviewing court in upholding Board findings to set out the supporting evidence in a formal opinion. Contrary to petitioner's assertions (*ibid.*), this Court and the circuit courts of appeals have often sustained Board findings and orders without a full, and sometimes without any, exposition of the evidence.[6] See, e. g., *American Manufacturing Co.* v. *National Labor Relations Board,* 309 U. S. 629; *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board,* 312 U. S. 660; *National Labor Relations Board* v. *Eastern Footwear Corp.,* 112 F. (2d) 716 (C. C. A. 2); *National Labor Relations Board* v. *Millfay Mfg. Co.,* 97 F. (2d) 1009 (C. C. A. 2); *Norristown Box Co.* v. *National Labor Relations Board,* decided December 1, 1941 (C. C. A. 3); *National Labor Relations Board* v. *Heilig Bros. Co.,* decided January 2, 1942 (C. C. A. 3); *Mexia Textile Mills* v. *National Labor Relations Board,* 110 F. (2d) 565 (C. C. A. 5); *National Labor Relations Board* v. *R. C. Mahon,* decided December 12, 1941 (C. C. A. 6); *Hobart Cabinet Co.* v. *National Labor Relations Board,* decided May 8, 1941 (C. C. A. 6), certiorari

[6] In accordance with uniform Board practice, the Board's decision in the instant case contains a full recital of the relevant evidence in support of the Board's ultimate findings of unfair labor practices.

denied, No. 630, this Term. The courts have also frequently refrained from restating facts administratively determined in cases involving other agencies. E. g., *Texas Electric Ry. Co.* v. *Eastus,* 25 F. Supp. 825 (N. D. Tex.), affirmed *per curiam,* 308 U. S. 512;[7] *Sprague* v. *Woll,* 122 F. (2d) 128 (C. C. A. 7), certiorari denied, No. 592, this Term. Cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146.[8]

3. Finally, petitioner contends (Pet. 3–6, 32–33, 35–36; Br. 6–22, 23–24, 29–32, 47–61), that there is no substantial evidence to support the Board's

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[7] In the *Texas Electric* case a similar point was raised. The trial court found that the determination of the Interstate Commerce Commission under the Railway Labor Act "was supported by substantial evidence in the record before it, and is neither arbitrary or capricious," and deliberately refrained from making findings as to the manner in which the line of railroad was operated. Transcript of Record, October Term, 1939, No. 31, R. 240–241. The carrier moved that these findings be amended so as to set forth in detail the facts relating to the carrier's operations. This motion was denied. *Id.*, 242–243. This ruling was assigned as error, and the point considered in the briefs filed in this Court. See appellant's brief, p. 9; appellee's brief, pp. 32–35. The affirmance *per curiam* is an indication that this point, as well as the main points in the case, was without substance.

[8] In the *Rochester* case this Court stated that:

"Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' * * *."

findings of unfair labor practices. The evidence reviewed in the Statement (*supra,* pp. 3–6) affords full support for the challenged findings. In any event petitioner's challenge to the findings presents no question of general importance. Nor is there any conflict, as petitioner asserts (Pet. 36; Br. 30–31, 50–53), with cases in other circuit courts of appeals overturning Board findings; these cases turned, as does the present case, upon their particular facts.[9]

CONCLUSION

The decision below, insofar as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any question

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[9] Petitioner relies particularly upon an alleged conflict with *Nevada Consolidated Copper Corp.* v. *National Labor Relations Board*, 122 F. (2d) 587 (C. C. A. 10), certiorari granted January 19, 1942, No. 774, this Term. The *Nevada* case held that, "If the evidence was as consistent with the hypothesis asserted by petitioner as the one upon which the Board predicated its order, it established neither" (*id.*, at 598). This erroneous standard does, of course, conflict with the test applied in the instant case, but only because and to the same extent that it conflicts with all of the prior decisions of this Court and hundreds of decisions in circuit courts of appeals accurately defining the scope of review under the National Labor Relations Act. This Court obviously need not review every decision applying the approved and proper rule because of the "conflict" created by a single erroneous decision. The Court has, moreover, decided to review the *Nevada* case. In any event the facts of the instant case and of the *Nevada* case are entirely different.

of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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